Supreme Court, U. S.
FILED
OCT 14 1975
MICHAEL RODAK, JR., CLERK

75-134

In the Supreme Court of the United States

OCTOBER TERM, 1975

MARY YOUNG CANNON

versus

WILLIAM J. GUSTE, JR., et al.

On Appeal From the United States District Court For the Eastern District of Louisiana

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Motion to Affirm

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 75-134

MARY YOUNG CANNON

versus

WILLIAM J. GUSTE, JR., et al

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM

Pursuant to Rule 16(1) (c) of the rules of this Court, the appellees herein move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from the judgment of a Three-Judge District Court dismissing the action brought by plaintiff seeking declaratory and injunctive

relief from the compulsory retirement requirement for Louisiana State employees statutes as contained in Louisiana Revised Statutes Title 42:691 and 42:572 and Chapter VIII, Sections 8.2 of the Rules and Regulations of the Louisiana State Employees' Retirement System.

Appellant, Mary Young Cannon, was a Louisiana State Civil Service employee who attained the age of 65 years during the month of November, 1974. She was eligible to retire as a member of the Louisiana State Employees' Retirement System. Under Louisiana law, an employee eligible to retire under either the Federal Social Security Law or any Public Employees' Retirement System who attains the age of 65 years, must retire, unless the employee's appointing authority certifies that it is to

the agency's advantage to retain such employee for one year. Ms. Cannon's appointing authority did not certify that she possessed such expert knowledge and qualifications that required her retention.

After having retired on November 31, 1974, Ms. Cannon filed an application for candidacy as a member of the Louisiana Civil Service Commission. The position, which became available under the terms of Louisiana's new Constitution effective midnight, December 31, 1974, requires that the Commission member be elected from the classified employees of the State. La. Const. of 1974, Art. X, Sec. 3(c). Since she was not a classified employee on January 3, 1975, when the call for the election was made, Ms. Cannon was denied candidacy in

the election.

The complaint alleged that:

1. She was denied procedural due process in being separated without being given a hearing.

2. The retirement statutes, based on an age of 65 years, are unconstitutional as violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The three-judge court, in a per curiam opinion, held that there was a rational basis for maintaining the mandatory retirement requirement at age 65 and, hence, there was no violation of the clause. In addition, the district Court found no jurisprudential precedent requiring the state to show a compelling interest because age has not been declared a suspect classification. With

reference to the due process contention, the lower court also found no protected property interest established by the appellant in her employment prior to dismissal. There was no "objective and bilateral expectation of continue employment..." See Appendix B at page 67 of appellant's Jurisdictional Statement.

ARGUMENT

Appellant's contentions were thoroughly considered by the three-judge district Court and the judges unanimously agreed that her constitutional rights had not been violated. The decision is correct and should be affirmed.

Appellant contends in Section A-1 of her Jurisdictional Statement that age is a suspect classification subject to strict scrutiny. Appellees contend that

age has not been found to be "suspect" in the jurisprudence and, therefore, the "compelling interest" test need not be applied. The Court below agreed, citing Weiss v. Walsh, 324 F. Supp. 75, 77 (S.D.N.Y., 1971) aff'd.,461 F. 2d 846 (2d Cir. 1972), cert. denied, 409 U.S. 1129 (1973):

> ... Notwithstanding great advances in gerontology, the era when advanced age ceases to bear some reasonable statistical relationship to disminished capacity or longevity is still future. It cannot be said, therefore, that age ceilings upon eligibility for employment are inherently suspect, although their application will inevitably fall injustly in the individual case. If the precision of the law is impugnable by the structure of general applicability, vindication of the exceptional individual may have to attend the wise discretion of the administrator....

The Weiss Court also noted that "(e)ven where the Equal Protection

Clause is buttressed by the Sixth Amendment's cross-sectional principle respecting jury selection, the Constitution tolerates some variation in eligibility at the ends of the age spectrum." 324 F. Supp. at 77.

Further, the State contends that Ms. Cannon may not attack the constitutionality of a statute from which she has derived benefits. The statutes creating the Civil Service and its Retirement System enabled Ms. Cannon to be employed by Charity Hospital and, also, made her position secure. These same laws provide for the mandatory retirement appellant desires to avoid.

This Court stated through Mr.Justice Rehnquist in Arnett v. Kennedy, 416 U.S. 134, 152-153 (1974):

The Court has previously viewed

skeptically the action of a litigant in challenging the constitutionality of portions of a statute under which it has simultaneously claimed benefits. In Fahey v. Mallonee, 332 U.S. 245 (1947), it was observed:

...

> It is an elementary rule of constitutional law that one may not 'retain the benefits of an Act while attacking the constitutionality of one of its important conditions.' United States v. San Francisco, 310 U.S. 16, 29. As formulated by Mr. Justice Brandeis, concurring in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348, 'The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.' Id., at 255.
>
> ...
>
> Here the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest. 416 U.S. at 155.

In Section A-4 of her Jurisdictional Statement, appellant states that Reed v.

Reed, 404 U.S. 71 (1971) compels a ruling in her favor. She claims that Murgia v. Commonwealth of Massachusetts, 376 F. Supp. 753 (D. Mass. 1974), decided by a three-judge court and pending in this Court, is controlling. Murgia applied the test set out in Reed, but Murgia is distinguishable on its facts. The Court in that case declared "that mandatory retirement of [police] officers at 50 years of age bears no 'fair and substantial relation to the object of the legislation.'" Id., at 754. [Citations omitted.] The Court specifically stated in footnote 9 of their opinion: "Whether we would reach the same result if the statute selected a more customary retirement age is not before us...." Id., at 756. Such a statement indicates that the Court does not

consider 50 years of age a customary age for retirement.

Age 65 is the age for retirement as set out in the Federal Social Security Law, in the Employee Retirement Income Security Act of 1974, specifically 29 U.S.C. Sec. 1002 (24) B(i), in many private retirement systems, and in Louisiana's retirement systems. Since it is used in so many retirement plans, we submit that age 65 is what the Murgia Court envisioned when it used the term "a more customary retirement age." Therefore, we contend, the result of Murgia should not be considered a proper precedent for decision in this case.

Further, courts have found that age 65 mandatory retirement bylaws adopted by an international union are a permissable means of accomplishing a

rational objective, Retail Clerks Union, Local 770 v. Retail Clerks Int. Ass'n., 359 F. Supp. 1285 (C.D. Cal. 1973); that mandatory retirement of senior grade miliary officers is constitutional, Norman v. United States, 392 F. 2d 255 (Ct.Cl. 1968) cert. denied, 393 U.S.1013 (1969); and that a mandatory retirement age of 60 years for police officers is not unreasonable, McIlvanie v. Pennsylvania State Police, 6 Pa. Cmwlth. 505, 296 A. 2d 630 (1972).

In Section A-5 of the Jurisdictional Statement, appellant claims that Louisiana's Retirement System should fall under the rational relationship test. The District Court did not agree. In the Court's opinion (Appendix B, at page 66, of Jurisdictional Statement) they stated:

> This court is satisfied that there is a rational basis for

> maintaining the mandatory retirement requirement at age sixty-five in that it is fairly and substantially related to the state's valid economic objective of maintaining an effecient, vigorous and healthy civil service, and of establishing a feasible system for promotions of younger employees. See Armstrong v. Howell, 371 F. Supp. 48 (D. Neb. 1974), a factually similar case. (Appendix B, at page 66 of Jurisdictional Statement.)

In Armstrong, the Court found "that the mandatory retirement provisions in question achieve[d] a permissible and logical end, and further that the means chosen [were] reasonable and rational." Id., at 53.

Appellant's claim in Section B of her Jurisdictional Statement, that the Statutes and Regulations deny her due process as a public employee in violation of the Fifth and Fourteenth Amendments to the United States Constitution

has found no support in recent court decisions, including that of the Three-Judge Court below in the case at bar.

This Court, through Mr. Justice Stewart, held that an assistant professor was not deprived of "liberty" protected by the due process clause of the Fourteenth Amendment, when he simply was not rehired in the job, but remained as free as before to seek other employment. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). The opinion of the Court below (Appendix B, at page 67 of Jurisdictional Statement) quoted from Roane v. Callisburg Independent School District, 511 F. 2d 633, 638 (5th Cir. 1975) citing Roth:

> To merit due process protections, a person must have more than an 'abstract desire' or even a compelling personal need for the interest in

question; he must be able to establish a 'legitimate claim of entitlement to it.' (408 U.S. at 577)

The Court continued further:

> As the Roth court expressly stated, 'property interests ... are not created by the Constitution, but rather "they are created...and defined by existing rules or understandings that stem from an independent source such as state law..." Board of Regents of State Colleges v. Roth, supra.
>
> (408 U.S. at 577)

The Court also stated:

> Plaintiff has not established that she possessed a constitutionally protected property interest in her employment prior to dismissal; a mere unilateral, subjective expectation that her request for continued employment of one year would receive the requisite final approval (see Plaintiff's Exhibit No. 10) [Affidavit at p. 74-75 of Plaintiff's Brief] is insufficient. See Perry v. Sindermann, 408 U.S. 593, 603 (1972).

The Court found that:

> A review of the record reveal[ed] nothing in plaintiff's employment relationship with the State that would justify or give rise to an objective and bilateral expectation of continued employment. (Appendix B, at page 67 of Jurisdictional Statement.)

Appellant Cannon must show a property interest sufficient to require a hearing, an interest set forth in law.(Also see Robison v. Wichita Falls & North Texas Com. Act. Corp., 507 F. 2d 245 (5th Cir. 1975).) Since in the present case the law specifically negates a property interest, a hearing is not required.

Ms. Cannon enjoyed the benefits of the Louisiana Civil Service Laws. She had no vested right to such employment outside of the security provisions found in state law. She cannot choose the statutes she wishes to affect her. Even

if appellant expected to carry on her duties past age 65 years, that mere subjective "expectancy" is not protected by procedural due process. Perry v. Sindermann, 408 U.S. 593 (1972).

In Section C of her Jurisdictional Statement, appellant states that the Louisiana Mandatory Retirement Statutes and Regulation embody a constitutionally offensive irrebuttable presumption of incompetency.

The appellant has misunderstood and misstated the rationale behind the system's retirement age. In providing for mandatory retirement of civil servants at age 65, the State seeks to provide an incentive for prospective younger employees to make a career as public servants. The requirement of mandatory retirement at age 65 is a condition to

the privilege of being employed by the state, of which the appellant and all employees have knowledge before they enter into an employment contract. Norman v. United States, 392 F. 2d 255, 259 (Ct.Cl. 1968) cert. denied, 393 U.S. 1013 (1969). Birnbaum v. Trussell, 371 F. 2d 672, 677 (2d Cir. 1966); Horton v. Orange County Board of Education, 342 F. Supp. 1244, 1249 (M.D. N.C. 1971). The retirement requirement presumes neither competency nor incompetency.

Appellant suggests that the individualized assessment mandated by Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) is feasible as an alternative to mandatory retirement. Such an assessment is made when an employee seeks a one-year extension beyond

age 65. Appellant's application for such an extension was denied. Since this denial was neither a deprivation of liberty, nor of a property right, as discussed above, there was no procedural due process constitutionally required.

Finally, in Section D of her Jurisdictional Statement appellant alleges that termination after approval of her request for a one-year extension of employment constitutes a breach of contract.

This issue has no place in this litigation. If appellant has a valid claim, she can present this to the Louisiana Civil Service Board for determination. In fact, she has such a claim pending at this time. If she was properly approved for a one-year extension,

the Civil Service Board is her proper source of remedy.

However, we do not concede that the extension was valid. The so-called approval of the extension was initialed by Dr. Brickman within days of his dismissal and nearly two months before plaintiff reached mandatory retirement age. Moreover, by departmental regulation, all applications for extension had to be approved by the Deputy Commissioner of the Louisiana Health and Human Resources Administration. (Affidavit at p. 74-75 of Jurisdictional Statement). The Court below found that appellant Cannon had not established that she had a constitutionally protected property interest in her employment prior to dismissal and the solely unilateral expectation that her request for an extension

of one year would be approved is insufficient.

Alternatively, appellees contend that any attempt at obtaining a money judgment against the State of Louisiana or Charity Hospital is barred by the Eleventh Amendment of the United States Constitution. The Eleventh Amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

While the Amendment, by its terms, does not bar suits against a State by its own citizens, this Court has held that states are immune from suits by their own citizens as well as by citizens of another state. Edelman v Jordan, 415 U.S. 651 (1974); Employees v.

Department of Public Health and Welfare, 411 U.S. 279 (1973); Parden v. Terminal Ry., 377 U.S. 184 (1964); Great Northern Life Insurance Co. v. Reed, 322 U.S. 47 (1944); Duhne v. New Jersey, 251 U.S. 311 (1920); Hans v. Louisiana, 134 U.S. 1 (1890).

This Court, on March 24, 1974, in the case of Edelman v. Jordan, 415 U.S. at 663, stated:

> It is also well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. In Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945), the Court said:
>
> > [W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. Id., at 464.

> Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. Great Northern Life Insurance Co. v. Read, supra; Kennecott Copper Corp. v. State Tax Comm'n., 327 U.S. 573 (1946). Edelman, supra, at 663.

For the foregoing reasons, it is respectfully urged that the judgment of the District Court should be affirmed.

Respectfully submitted,

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C E R T I F I C A T E

I hereby certify that a copy of the foregoing Motion to Affirm has been served upon counsel for appellant by mailing the same, properly addressed and postage prepaid this 10th day of October, 1975

New Orleans, Louisiana.

KENDALL L. VICK
Assistant Attorney General